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Type of paper transmitted: APPEAL BRIEFApplicant's Name: James H. Cink, et al.Serial No.: 10/805,802 Examiner: K. RowanFiling Date: 03/22/04 Art Unit: 3643 Confirmation No.: 9954Application Title: PEST CONROL DEVICE AND METHODIF YOU DO NOT RECEIVE ALL PAGES CLEARLY, CALL BACK AS SOON AS  
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FEE TRANSMITTAL

Application Number 10/805,802  
Filing Date March 22, 2004  
Inventor(s) J. Cink et al.  
Examiner Name K. Rowan  
Attorney Docket Number WMMG 3562.4

Art Unit 3643  
Confirmation No. 9954

☐ Applicant claims small entity status.


METHOD OF PAYMENT

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Multiple Dependent Claims Fee \$ \_\_\_\_\_  
(HP = highest number of claims paid for)
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- Total Pages N/A - 100 = NaN ÷ 50 = 0 x \$ \_\_\_\_ = \$0.00  
(Application + Drawings) (round up to whole #)
- Subtotal (3) \$0.00
4. ☐ OTHER FEE(S)
- ☒ One \_\_\_\_\_ month extension of time  
☐ Information disclosure statement  
☐ 37 CFR 1.17(q) processing fee  
☐ Non-English specification  
☐ Notice of Appeal  
☒ Filing a brief in support of appeal  
☐ Request for oral hearing  
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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of J. Cink et al.  
Serial No. 10/805,802  
Filed March 22, 2004  
Confirmation No. 9954  
For PEST CONTROL DEVICE AND METHOD  
Examiner Kurt Rowan

Art Unit 3643

March 2, 2006

**NOTICE OF FILING APPEAL BRIEF FROM THE EXAMINER  
TO THE BOARD OF PATENT APPEALS AND INTERFERENCES**

TO THE COMMISSIONER FOR PATENTS,

SIR:

\* Appellant hereby files its Appeal Brief to the Board of Patent Appeals and Interferences. This appeal is from the Examiner's decision mailed July 5, 2005, finally rejecting the claims. A Notice of Appeal was mailed December 27, 2005.

\* A fee transmittal is submitted herewith in payment of the fee for filing this Appeal Brief and for a one-month extension up to and including March 27, 2006. While no other fee is believed due at this time, the Commissioner is authorized to charge any fee due to Deposit Account No. 19-1345 in the name of Senniger Powers.

Respectfully submitted,



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**APPEAL BRIEF**

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Serial No. 10/805,802  
Filed March 22, 2004  
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For PEST CONTROL DEVICE AND METHOD  
Examiner K. Rowan

Art Unit 3643

March 2, 2006

**APPEAL BRIEF**

This is an appeal from the final rejection of the claims of the above-identified application as set forth in the final Office action dated July 5, 2005. A Notice of Appeal was filed on December 27, 2005.

**I. REAL PARTY IN INTEREST**

The real party in interest in connection with the present appeal is Whitmire Micro-Gen Research Laboratories, Inc., a corporation of the state of Delaware, owner of a 100 percent interest in the pending application.

**II. RELATED APPEALS AND INTERFERENCES**

Appellant is unaware of any pending appeals or interferences which may be related to, directly affect or be directly affected by, or have a bearing on, the Board's decision in the pending appeal.

**III. STATUS OF CLAIMS**

Claims 15-17, 19, 20, and 24-32 are pending in the application. All pending claims stand rejected. Claims 1-14, 18, and 21-23 were previously cancelled. A clean copy of the pending claims that are being appealed appears in the Claims Appendix of this Brief.

**IV. STATUS OF AMENDMENTS**

No amendments have been filed after the final rejection.

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PATENTV. SUMMARY OF CLAIMED SUBJECT MATTER

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

The present invention is directed to an aggregation base 22 for use with an apparatus received within a subterranean cavity (e.g., a hole dug into the ground) for detecting and controlling termites. (See pages 13 and 14, paragraph [0039], and Figs. 2 and 3). The aggregation base 22 is made of wood or other material attractive to termites for providing a location where termites congregate (i.e., an aggregation site). (See pages 9-10, paragraph [0030]). The aggregation base 22 has a generally cylindrical outer surface 40 that, in use, faces toward the subterranean cavity. (See pages 9 and 10, paragraph [0030], and Fig. 3). The aggregation base 22 also includes at least one void 42 forming the aggregation site for the termites and includes at least one channel 44 passing completely through the aggregation base from the cylindrical outer surface and leading inward to the void. (See pages 9 and 10, paragraph [0030], and Fig. 3). In one example, the void 42 is cylindrical and substantially centrally located within the aggregation base 22. (See pages 9 and 10, paragraph [0030], and Fig. 3). The aggregation base 22 also comprises a top surface substantially orthogonal to the cylindrical outer surface 40. (See Fig. 3). The void 42 extends to the top surface for visual inspection of the void for visible signs of termite activity without substantially disturbing the aggregation base 22. (See pages 16 and 17, paragraphs [0045] and [0046], and Figs. 2 and 3).

As illustrated, the aggregation base 22 comprises two separable, semi-cylindrical portions with at least one channel in each portion. (See pages 9 and 10, paragraph [0030], and Fig. 3). The two semi-cylindrical portions are placed together in a housing 12 or within the subterranean cavity so as to define a cylinder. In the example shown, each portion comprises three, evenly spaced channels 44 oriented substantially orthogonal to the cylindrical outer surface and extending into the void 42. The channels 44 guide the termites from the outer surface 40 into the void 42. (See pages 9 and 10, paragraph [0030], and Fig. 3).

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PATENT**VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

Whether claims 15 and 27 are unpatentable under 35 U.S.C. § 103 over U.S. Patent No. 6,016,625 (Bishoff et al.).

**VII. ARGUMENT**

Claims 15 and 27 are patentable over Bishoff et al.

**Claim 15**

Appellant respectfully disagrees with the Examiner's position that it would have been obvious in view of Bishoff et al. to use the pest baiting devices 80 and monitoring devices 122 of Bishoff et al. to form an aggregation base having a generally cylindrical outer surface with at least one channel passing completely through the aggregation base from the cylindrical outer surface and leading inward to a void. Accordingly, claim 15 is submitted as patentable over Bishoff et al.

In determining whether a case of *prima facie* obviousness exists, it is necessary to ascertain whether the prior art teachings would appear to be sufficient to one of ordinary skill in the art to suggest making the claimed substitution or other modification. Obviousness can only be established by modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references or in the knowledge generally available to one of ordinary skill in the art. M.P.E.P. §2143.01 (citing *In re Kotzab*, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000)). The mere fact that a prior art reference may be modified to obtain the claimed invention does not make the claimed invention obvious if there is no suggestion or motivation in the reference to make the modification. *In re Mills*, 916 F.2d 680, 682, 16 U.S.P.Q.2d 1430, 1432 (Fed. Cir. 1990). The prior art must provide one of ordinary skill the motivation to make the proposed modifications. *In re Lalu*, 747 F.2d 703, 705, 223 USPQ 1257, 1258 (Fed. Cir. 1984). Such motivation is clearly lacking in this case. Moreover, to establish *prima facie* case of obviousness, all the claim limitations must be taught or suggested by the cited prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

Claim 15 is directed to an aggregation base for use with an apparatus for detecting and controlling subterranean termites. The aggregation base functions as an aggregation site for termites, strongly rooting them to the apparatus. The claimed aggregation base

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comprises a generally cylindrical outer surface and at least one void within the aggregation base for forming an aggregation site for the termites. The void creates a preformed stopping place for termites exploring the apparatus. This void creates an attractive aggregation site for the termites. To further attract termites to the aggregation site, the aggregation base also comprises at least one channel passing completely through the aggregation base from the cylindrical outer surface and leading inward to the void. The at least one channel guides the termites from the cylindrical outer surface of the aggregation base to the interior void, such that the termites begin to use the void as an aggregation site. The at least one channel facilitates termite identification and use of the aggregation base as an aggregation site and a food source. As the termites contact the cylindrical outer surface of the aggregation base, they will naturally explore the outside of the aggregation base. The discontinuity formed in the outer surface of the aggregation base 22 by the channel 44 encourages the moving termites to enter the aggregation base and consider use of the internal void 42 as an aggregation site. After triggering exploration inward via the channel, the termite may access the aggregation space without additional tunneling. In other words, the at least one channel both attracts termites and leads them to the aggregation site where pheromones can be released to attract companion termites for feeding. Because the void and channel of the aggregation base are open and ready for exploration and use, the termites are encouraged to create an aggregation site and invite other companion termites, without the need for additional tunneling.

The Examiner's rejection of claim 15 as being obvious in view of Bishoff et al. is based upon a combination of the embodiments shown in Figs. 2 and 4 thereof. As will be explained more fully below, there is no suggestion for making the combination of embodiment in the way suggested by the Examiner. In essence, Bishoff et al. show in Figs. 1 and 3 that a cylindrical monitoring device, even when made in two semi-cylindrical pieces fitted together, will leave no channel through the cylindrical surface providing access to any central void as required by claim 15. Combining Figs. 2 and 4, while ignoring the clear teaching of Figs. 1 and 3 is an improper hindsight reconstruction of Bishoff et al. Without at least one channel leading to a void, there is no discontinuity in the surface of the monitoring device for encouraging termites to explore, and ultimately use, the monitoring device. Moreover, because there is no existing void accessible to the termites for use as an aggregation site, the termites must physically construct their own void and aggregation site

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by tunneling, which discourages use of the monitoring device. Appellants will now explain their position in more detail.

Generally, the disclosure of Bishoff et al. pertains to extractor means 42, 44, 142 for selectively moving termite monitoring and baiting devices. (See column 5, line 28 to column 6, line 56, column 11, lines 9-29, and Figs. 1-4). Referring now to Fig. 2, Bishoff et al. also disclose a bottom element, or cup, 72 that receives a pest baiting device 80. (See column 7, lines 7-35). The extractor means and pest baiting device are configured to cooperate with one another. When placed together, the pest baiting device forms "an inner wall 83 defining a *substantially enclosed* channel 82 which is adapted to receive (preferably slidably receive) extractor means 42 or 44 . . . ." (See column 7, lines 17-20) (emphasis added).

Bishoff et al. never intend for the channel 82 to function as a void for the aggregation of termites, and the Examiner has pointed to nothing in Bishoff et al. teaching the contrary. The purpose of Bishoff et al.'s channel 82 is to provide a passage through the pest baiting device for the extractor means 42, and more specifically for an elongate member 48 of the extractor means. The elongate member 48 appears to mostly fill the channel 82, making it unacceptable as an aggregation site. Further, the channel 82 opens on the flat axial ends of the device 80, not on its cylindrical surface as required by claim 15. Therefore in use, access to the channel 82 is further blocked by the base 46, cap 86 and base 54 of extractor means 44. As a result, Bishoff et al.'s pest monitoring device 80 appears to provide no ready access for termites to the channel 82 and in particular fail to show at least one channel passing completely through the device 80 from the outer cylindrical surface leading inward to the channel 82.

The Examiner apparently recognizes the deficiency in the Fig. 2 embodiment of Bishoff et al., and tries to remedy the absence of channels extending through the cylindrical outer surface of the void by reference to Fig. 4.

In Fig. 4, Bishoff et al. disclose, instead of the cylindrical pest monitoring device 80, two, rectangular wood monitoring devices 122 for use together as a lower monitoring device within housing 112. (See column 11, lines 9-29). An extractor means 142 comprising a base 146 and an elongated finger 148 having a flattened bar shape cooperates with the devices 122 for moving the devices. The rectangular wood monitoring devices 122 are disposed adjacent to the base 146 and on opposite sides of the elongated member 148, and are spaced apart by the elongated member. As best understood, the Examiner maintains that this

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provides channels through sides of an aggregation based formed by the two rectangular blocks. The Examiner recognizes that Fig. 4 embodiment lacks any cylindrical surface required by claim 15. However in the Examiner's analysis, the embodiment of Fig. 4 allegedly teaches one of ordinary skill in the art how to modify the Fig. 2 embodiment to produce channels through the outer cylindrical surface of the pest monitoring device 80 to produce Appellants' claimed invention.

The Examiner's analysis is wrong for at least two, related reasons, both of which illustrate that there is no suggestion for combining Figs. 2 and 4 in the way proposed. The first is that the channel 82 in Fig. 2 and the gap between rectangular blocks 122 in Fig. 4 are there for no other reason than to provide passage for the extractor members (48 in Fig. 2 and 148 in Fig. 4). Thus, no express or implied teaching of providing access for termites to an aggregation site in a void exists in Bishoff et al. The second is that Bishoff et al. specifically address how to construct a cylindrical bait monitoring device in Figs. 1 and 3, and this construction does not provide for a channel through the cylindrical outer surface to a central void. Thus, an express teaching in Bishoff et al. contrary to the Examiner's hindsight reconstruction of Bishoff et al. is available.

The gap between the rectangular wood blocks 122 is present only because the elongate member 148 extends between them so that the blocks can be pulled up from (or lowered into) the housing 112 from above. In use, access to this gap through the sides of the wood blocks 122 is mostly or completely blocked by the structure of the housing 112. The apertures 120 in each half of the housing extend to a solid vertical edge margin. When the housing halves are connected together, this solid margin appears to cover the gap from the side. This prevents access to the space between the blocks through the sides. Thus, Bishoff et al. lack any teaching in Fig. 4 for providing access through a side surface of a bait device (i.e., the combination of the two rectangular blocks 122) to an interior void. In fact we know that Bishoff et al. are not concerned with providing access for termites to an inner void, but rather with providing a space for extension of extractor structure. Lacking this teaching, they fail to provide any basis for modifying Fig. 2 to produce the claimed configuration in which channels extend through a cylindrical outer surface to a void, as required by claim 15.

Moreover, Bishoff et al. show us how to construct a bait device in Figs. 1 and 3. In both of these illustrations, the semi-cylindrical pieces 22 appear to fit flush together so that there is no space between the pieces. Moreover, Appellants do not concede that an

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incidental spacing between pieces that does not admit a termite would constitute a channel leading to an aggregation site for termites. Otherwise, the channel 40 would not be substantially enclosed as described by Bishoff et al. (col. 5, ll. 28-34). The explicit teaching of Bishoff et al. is that when a cylindrical bait is used, even if it is formed of two pieces, it is brought together so as not to provide a channel in a cylindrical surface. The Examiner's strained attempt to combine Figs. 2 and 4 (while ignoring Figs. 1 and 3) to produce an aggregation base having channels extending completely through it to a void that is an aggregation site for termites must fail in view of this express teaching to the contrary. The only way one can manipulate Figs. 2 and 4 to produce Appellants' claimed invention is by hindsight reconstruction, which is forbidden. (See *In re Rouffet*, 149 F.3d 1350, 1358, 47 U.S.P.Q.2d 1453 (Fed. Cir. 1998) and *W.L. Gore & Assoc. v. Garlock, Inc.*, 220 U.S.P.Q. 303, 312-13 (Fed. Cir. 1983)).

Accordingly, the rejection of claim 15 as being obvious in view of the combination of Figs. 2 and 4 of Bishoff et al. should be reversed. Claims 16-32, depending directly or indirectly from claim 15, are submitted as patentable for the same reasons as claim 15.

Claim 27

Claim 27 is directed to an aggregation base comprising two separable portions, wherein at least three channels in each portion are oriented substantially orthogonal to the cylindrical outer surface. Bishoff et al. fail to disclose these novel features. There is no disclosure in Bishoff et al. for an aggregation base that includes at least three channels in each portion of the aggregation base. Appellants set forth such arguments regarding claim 27 in the Letter to the Patent and Trademark Office dated September 6, 2005 (see page 5, lines 9 to 25), and the Examiner did not address the specific features of claim 27 in the Advisory Action dated November 22, 2005.

The at least three channels arranged substantially orthogonal to the cylindrical outer surface of the aggregation base facilitate termite identification and use of the aggregation base as an aggregation site and a food source. As the termites contact the cylindrical outer surface of the aggregation base, they will naturally explore by moving longitudinally up or down the outside of the aggregation base. The discontinuities formed in the outer surface of the aggregation base 22 by the channels 44 encourage the moving termites to enter the aggregation base and to consider use of the internal void 42 as an aggregation site. By

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orienting the channels substantially orthogonally to the cylindrical outer surface, termites moving longitudinally of the aggregation base will encounter the three channels as sharp, surface discontinuities, which will trigger their exploration inward. After triggering exploration inward via the channel, the termite may access the aggregation space without additional tunneling. In other words, the at least three channels both attract termites and lead them to the aggregation site where pheromones can be released to attract companion termites for feeding. With at least three channels on each portion of the aggregation base, the termites are strongly encouraged to enter the aggregation base because they have an increased incidence of discontinuity (as compared with a single channel, or no channel), and thus a greater opportunity to enter the aggregation base. Because the void and channels of the aggregation base are open and ready for exploration and use, the termites are encouraged to create an aggregation site and invite other companion termites, without the need for additional tunneling.

Bishoff et al. provide no teaching or suggestion for these novel and unobvious elements. As discussed in detail above, Bishoff et al. fail to teach or suggest any such channels passing completely through the aggregation base and leading to a void. Without channels, the Bishoff et al. cannot render claim 27 unpatentable because each of the claimed features is not taught. In addition to lacking channels, the pest baiting devices 80, 180 of Bishoff et al. fail to provide any discontinuities of any kind. With no channels acting as discontinuities to attract termites to the pest baiting devices 80, the termites must expend effort to tunnel into the devices and create their own aggregation site. Although termites are capable of penetrating such a continuous surface, they are much more likely to continue exploring for other discontinuities in the food source. Bishoff et al. also fail to disclose channels orthogonal to the cylindrical outer surface, as required by claim 27. As noted above, this orientation encourages exploration of the channels by termites as they naturally explore the food source by moving longitudinally upward and downward along the aggregation base. The substantially orthogonal arrangement of the channels ensures that the moving termites will encounter the channels as they explore.

Bishoff et al. does not render claim 27 unpatentable because it fails to teach or suggest the features of claim 27. Accordingly, claim 27 is submitted as patentable over Bishoff et al. and the other references of record. Claim 28, which depends directly from claim 27, is also submitted as patentable for the same reasons as claim 27.

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For all of the above reasons, appellant respectfully requests the Examiner's rejections be reversed and that claims 15-17, 19, 20, and 24-32 be allowed.

Please charge Deposit Account No. 19-1345 \$620.00 for submission of this brief in accordance with 37 C.F.R. 41.20 (b)(1) and for a one-month extension of time in accordance with 37 C.F.R. 1.136(a). While no other fee is believed due at this time, the Commissioner is authorized to charge any fee due to Deposit Account No. 19-1345 in the name of Senniger Powers.

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VIII. CLAIMS APPENDIX

15. An aggregation base for use with an apparatus received within a subterranean cavity for detecting and controlling subterranean termites, said aggregation base being attractive to said termites for forming an aggregation site for said termites, said apparatus having a replaceable container device sized and shaped such that the container device may be removed from the apparatus and replaced without substantially disturbing the aggregation base, said aggregation base comprising:

a generally cylindrical outer surface,

at least one void within said aggregation base for forming an aggregation site for said termites, and

at least one channel passing completely through the aggregation base from the cylindrical outer surface and leading inward to said void.

16. The aggregation base as set forth in claim 15 wherein said void is substantially centrally located within said aggregation base.

17. The aggregation base as set forth in claim 16 wherein said outer surface of said aggregation base extends laterally outward to face said subterranean cavity.

19. The aggregation base as set forth in claim 15 wherein said aggregation base is a cellulosic material.

20. The aggregation base as set forth in claim 19 wherein said aggregation base is wood.

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24. The aggregation base as set forth in claim 15 wherein said aggregation base comprises two separable portions.

25. The aggregation base as set forth in claim 24 further comprising at least one channel in each portion.

26. The aggregation base as set forth in claim 25 further comprising at least three channels in each portion.

27. The aggregation base as set forth in claim 26 wherein said at least three channels are oriented substantially orthogonal to said cylindrical outer surface.

28. The aggregation base as set forth in claim 27 wherein said at least three channels are substantially evenly spaced from one another.

29. The aggregation base as set forth in claim 24 wherein each portion is substantially a semi-cylindrical.

30. The aggregation base as set forth in claim 15 wherein said void is substantially cylindrical.

31. The aggregation base as set forth in claim 15 further comprising a top surface substantially orthogonal to said cylindrical outer surface, wherein said void extends to said

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top surface for visual inspection of the void for visible signs of termite activity without substantially disturbing the aggregation base.

32. The aggregation base as set forth in claim 15 wherein said aggregation base is comprised of a foam material.

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IX. EVIDENCE APPENDIX

None.

X. RELATED PROCEEDINGS APPENDIX

None.